



August 26, 2005

**EX PARTE PRESENTATION**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Portals II, Room TW-A325  
Washington, DC 20554

Re: TracFone Wireless Petition for Forbearance,  
*Federal-State Joint Board on Universal Service*, CC Docket No. 96-45

Dear Ms. Dortch:

USTelecom submits this *ex parte* presentation in response to the letter filed by TracFone Wireless, Inc. in this docket on August 22, 2005.<sup>1</sup> USTelecom is concerned that permitting TracFone to receive Lifeline support as a reseller will facilitate fraud, waste, and abuse in a universal service program unless substantial new (and potentially costly) procedures and controls are adopted. Many USTelecom members rely on universal service support, so the ongoing integrity, stability, and viability of all universal service support mechanisms is of paramount importance to our members and USTelecom as an organization.

**I. TRACFONE HAS NOT MET ITS BURDEN OF PROVING THAT FORBEARANCE IS JUSTIFIED; SHOULD FORBEARANCE BE GRANTED IT MUST BE CONDITIONAL.**

TracFone has not met its burden of proving that its proposed prepaid, wireless resale product to be distributed through third-party, general-purpose retail establishments meets the requirements for forbearance under Section 10<sup>2</sup> of the Communications Act. In particular, it has never justified or documented its primary public interest argument that grant of the petition will increase Lifeline penetration. Without support for that threshold argument, TracFone's petition must fail. However, if the Commission concludes that TracFone has met the requirements for forbearance (and it has not), the Commission must condition its grant of forbearance to limit the public interest harm that could flow from such a grant. Specifically:

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<sup>1</sup> Letter from Mitchell F. Brecher, Counsel for TracFone, to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, *Federal State Joint Board on Universal Service*, CC Docket No. 96-45 (August 22, 2005) (TracFone August 22 *ex parte*).

<sup>2</sup> 47 U.S.C. §160.

1. The grant of forbearance must be limited to allowing TracFone to seek Eligible Telecommunications Carrier (ETC) status solely for the purpose of receiving Lifeline support.<sup>3</sup>
2. TracFone must certify that it is offering E911 service to all customers and that all handsets are E911 capable.
3. TracFone must certify the Lifeline eligibility of all customers and certify that Lifeline support will be provided to only one phone (wireline or wireless) per household
4. TracFone must fully address and mitigate the issues raised by this new and different method of providing Lifeline service in the separate proceedings whereby TracFone is seeking designation as an ETC.
5. A customer cannot use Lifeline-supported service until after TracFone has completed verification of the customer's Lifeline eligibility at TracFone corporate offices, including receipt of documentation of eligibility, and has obtained verbal confirmation from the customer that his or her household is only receiving support on one line.
6. Lifeline support will not be disbursed to TracFone until *after* the Commission rules on TracFone's ETC petitions and after the Commission (and not TracFone) establishes rules that determine the appropriate and competitively neutral amount of support for the product on which Lifeline support is sought.
7. Failure to abide by these conditions must result in revocation of ETC status.
8. The Commission should also make clear that it will not grant additional, similar petitions until it has completed the rulemaking proceeding discussed immediately below.

It is particularly troublesome that these conditions for permitting TracFone to receive Lifeline service would need to be reapplied in subsequent forbearance proceedings and/or ETC applications by other resellers. Instead of forbearance, it would be more efficient for the Commission to adopt safeguards through a rulemaking proceeding, and such a process would be more likely than an *ad hoc* process to lead to safeguards that adequately protect the public interest. In fact, the Commission should not approve TracFone's pending ETC petitions until after the Commission has issued rules that will govern how TracFone will receive Lifeline support.

In its August 22 *ex parte* letter in this docket, TracFone attempted to respond to some of the problems USTelecom identified with TracFone's forbearance petition.<sup>4</sup> Before turning to the substantive flaws in TracFone's arguments, and further specific explanations of the infirmities

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<sup>3</sup> TracFone apparently has agreed to this condition. See TracFone Wireless, Inc., Ex Parte Supplement to Petition for Forbearance and Petitions for Designation as an Eligible Telecommunications Carrier, *Federal State Joint Board on Universal Service*, CC Docket No. 96-45 (July 15, 2005) (TracFone Ex Parte Amendment).

<sup>4</sup> Letter from Robin E. Tuttle, Counsel for USTelecom, to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, *Federal State Joint Board on Universal Service*, CC Docket No. 96-45 (August 17, 2005) (USTelecom August 17 *ex parte*).

with TracFone's forbearance petition, USTelecom takes this opportunity to respond to TracFone's procedural arguments.

Among other things, TracFone stated that USTelecom had not opposed the forbearance petition before August 17, 2005,<sup>5</sup> which is incorrect.<sup>6</sup> TracFone also wrote that "USTelecom does not demonstrate or even allege that TracFone's petition fails to meet any of the statutory forbearance requirements codified at Section 10."<sup>7</sup> This too is incorrect; USTelecom specifically argued in the August 17 *ex parte* letter that TracFone has failed to meet its burden of proving that its petition meets the Section 10 forbearance requirements.<sup>8</sup>

TracFone also inappropriately portrayed USTelecom's well-founded concerns as a "dilatory tactic" and urged the Commission not to address these concerns, allegedly because they were not timely made. In fact, TracFone did not provide the meaningful (and still incomplete) details of its proposal until July 2005—nearly a year after it filed its petition—and USTelecom is now responding to this new information in a timely fashion. In fact, TracFone's petition and the services TracFone seeks to offer seem to be moving targets that "evolve over time" and, thus, this proceeding could potentially lead to unintended consequences.

More importantly, no time limit has passed under Commission procedure for raising issues in this proceeding so it would be arbitrary and capricious for the Commission to fail to address properly raised issues, including those USTelecom is raising here. In sum, the Commission should not be swayed by TracFone's attempt to divert attention away from the merits of this proceeding, which seeks, in effect, an amendment of the Communications Act.

## **II. TRACFONE HAS NOT MET EVEN ONE OF THE THREE PRONGS OF THE SECTION 10 TEST FOR FORBEARANCE.**

To clarify the issues and facilitate the Commission's analysis in the face of TracFone's obfuscatory tactics, USTelecom explains how the issues raised in its August 17 *ex parte* letter prevent a finding that TracFone has met its burden of proving the elements of the Section 10 test for forbearance. When TracFone's petition is evaluated under the three-part test for forbearance, it fails all three parts. TracFone has not shown: (1) that the facilities requirement is not necessary to ensure that rates are just and reasonable, and not unjustly or unreasonably discriminatory; (2) that the facilities requirement is not necessary to protect consumers; or (3) that forbearance from the facilities requirement is in the public interest.

### ***A. The Facilities Requirement Helps Ensure That Rates Are Just And Reasonable, And Not Unjustly Or Unreasonably Discriminatory.***

TracFone cannot prove that continued enforcement of the facilities requirement in Section 214(e)(1)(A) is unnecessary by proposing resale plans that raise serious concerns about

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<sup>5</sup> TracFone August 22 *ex parte*, at 2.

<sup>6</sup> USTelecom specifically argued nearly a year ago that the Commission should deny TracFone's forbearance petition. Comments of the United States Telecom Association, *Federal State Joint Board on Universal Service*, CC Docket No. 96-45 (September 20, 2004). *See also*, Comments of the United States Telecom Association, *Federal State Joint Board on Universal Service*, CC Docket No. 96-45 (December 15, 2004).

<sup>7</sup> TracFone August 22 *ex parte*, at 2.

<sup>8</sup> USTelecom August 17 *ex parte*, at 5.

unjust and unreasonable, and unjustly and unreasonably discriminatory rates, yet this is precisely what TracFone has done. There are substantial differences between the two plans outlined in TracFone's July 15 Ex Parte Supplement and traditional Lifeline service that suggest some of TracFone's Lifeline customers would pay rates that are not just and reasonable, or that are unjustly or unreasonably discriminatory.

First, there is no Commission-defined relationship between minutes and monthly access for Lifeline support. Lifeline support is defined in section 54.403 of the Commission's rules,<sup>9</sup> and the core component is the End-User Common Line charge for the Incumbent Local Exchange Carrier in the area, which is regulated and covers a defined service, namely federally-tariffed local exchange and exchange access service. This defined service is different from the service offered by TracFone, which provides prepaid minutes rather than subscription access. The Commission cannot determine without notice and comment that, when TracFone provides airtime at rates of between \$0.10 per minute and \$0.50 per minute, it is providing a value to its customers that is comparable to the value provided by other supported Lifeline services.<sup>10</sup>

Second, unlike with traditional landline-based Lifeline service, TracFone customers will not receive the unlimited ability to *receive* calls during the month, which is an important attribute when using the phone as a utility for receiving communications from employers, for example. Rather, TracFone customers will have to combine their inbound and outbound communications in their measured rate and employers will not be able to reach a customer when he or she has used all of the Lifeline-supported minutes but not purchased additional minutes.

Third, both of the plans described in TracFone's July 15 Ex Parte Supplement appear to create the very real possibility that some Lifeline customers will not receive the full benefit of their support or, at any rate the same support as other Lifeline customers in the same area. The "special version" of the Pay-As-You-Go Annual Plan would provide 30 minutes a month, and one free minute for every additional minute the customer purchases during the month. Therefore, customers that use 30 or fewer minutes would receive significantly less value than the \$10.00 TracFone intends to claim in support (those 30 minutes appear to be worth only \$3.00 at the rate charged under the NET10 plan). Moreover, TracFone is seeking to convert the nature of Lifeline support to customers from monthly access to usage with this plan. This means that TracFone's Lifeline-supported customers would receive very different amounts of support based on their usage (those using more minutes would receive more support). This is quite possibly unjustly or unreasonably discriminatory and, in any event, it is such a deviation from most current Lifeline support that it must be reviewed by the Commission in a rulemaking proceeding.

Not only does the Pay-As-You-Go Annual Plan appear likely to provide differing levels of support to customers based on their usage, it also charges customers very different rates for supported services depending on customer usage. According to TracFone's web site, A Pay-As-You-Go Annual Plan customer has to purchase \$80.00 worth of additional minutes in order to receive the lowest rate of \$0.10 per minute, which is the same as the rate under the NET10 plan.<sup>11</sup> If a customer on the Pay-As-You-Go Annual Plan were to purchase the cheapest package of additional minutes (which costs \$20.00) each month, he or she would receive 110 minutes per

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<sup>9</sup> 47 C.F.R. § 54.403

<sup>10</sup> See [https://www.tracfone.com/prepaid\\_details.jsp](https://www.tracfone.com/prepaid_details.jsp).

<sup>11</sup> TracFone has reserved for itself the right to limit the sale of additional minutes so that it will never receive less than \$0.10 per minute. See *id.*

month at an average price (including Lifeline support) of over \$0.18 per minute. Since it is unlikely that most customers would purchase enough additional minutes to receive the lowest rates, TracFone seems poised to receive substantially more than \$0.10 per minute under this plan, including \$10.00 in universal service support. Equally important, it is clear that Lifeline customers will pay widely varying rates for airtime depending on their level of usage. This seems inconsistent with the essential purpose of the Lifeline program and, in any event, it is also such a departure from the existing program that the Commission must review it in a rulemaking.

Option 2 under the NET10 plan, which would provide Lifeline customers with monthly \$10.00 coupons that they could use to purchase additional minutes through retailers or online, is illustrative of a different, yet substantial, concern. Customers notoriously fail to redeem coupons because they forget to use them, lose them, or don't purchase the product for which they received the coupon. Based on TracFone's filings, it appears that one of two things would happen each month: (1) either TracFone would claim support each month, without regard to whether the customer had redeemed the coupon, which would provide TracFone with more support than it would be passing on to customers; or (2) TracFone would only claim support on the number of coupons redeemed each month, in which case Lifeline-eligible customers that signed up for Lifeline service would *not* be receiving support. Accordingly, the Commission would run a substantial risk of Lifeline support either being provided to TracFone but not passed on to eligible customers, or of eligible customers simply not receiving support.

The risks associated with TracFone's plans presented in this docket are only the "tip of the iceberg" of potential problems. TracFone specifically reserved the right to change the terms of its offers, writing that "pricing and other service features will be changed from time-to-time."<sup>12</sup> While there is nothing wrong with pricing flexibility from a business perspective (indeed USTelecom members generally need greater pricing flexibility than they currently have), Lifeline support is defined in the rules by reference to a regulated rate that cannot be changed from "time-to-time."<sup>13</sup> If TracFone were free to change the terms of the services it offers in return for receiving defined Lifeline support at its own discretion, the Commission can be sure that TracFone would inevitably provide different levels of support to customers from "time-to-time" despite its written assurance that "one hundred percent of the Universal Service Fund support it receives will be flowed through to Lifeline customers."<sup>14</sup>

The problems with potentially unjust, unreasonable, or discriminatory rates are not addressed by TracFone arguing (or the Commission deciding) that other Lifeline-supported providers currently experience the same problems. Permitting resellers, such as TracFone and the competitors that will surely follow, to receive Lifeline support substantially increases the risk of these problems and it multiplies the ensuing harm, probably many times over. Moreover, any Lifeline-supported providers that currently experience these problems are not seeking forbearance from a statutory mandate.

### ***B. Enforcement Of The Facilities Requirement Protects Consumers.***

The Commission must recognize that TracFone has not asked to (nor can it) provide Lifeline service in the same manner as facilities-based carriers must under the current rules. As a

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<sup>12</sup> TracFone July 15 Ex Parte Supplement, at 3.

<sup>13</sup> 47 C.F.R. § 54.403

<sup>14</sup> TracFone August 22 ex parte, at 4.

result, the petition presents very real risks of waste, fraud, and abuse. TracFone customers apparently will be required to attest to their Lifeline eligibility. It does not appear, however, that there will be any meaningful check against customers signing up multiple times using different names or addresses. In particular, TracFone does not maintain a network that is physically connected with its customers' houses. Nor does TracFone appear typically to attempt to contact its customers, for example to deliver bills. Therefore, it appears that TracFone's products do not come with built-in processes that would reveal when customers are not at the addresses they provide, or when multiple accounts are at the same address. TracFone will have to rely, instead, solely on unconfirmed customer statements verifying Lifeline eligibility and the delivery of only one line of supported service per household. There is little reason for the Commission to be confident that this system will allow for the detection and prevention of fraud, waste, and abuse because errors and misstatements will not be easily detected. At the very least, TracFone should be required to obtain documentation from each customer to verify Lifeline eligibility and that they reside at the addresses they claim.

TracFone's retail distribution strategy creates another readily-anticipated source of concern. TracFone products are distributed through over 60,000 retail establishments, including major supermarkets, diversified retail stores, pharmacies, and even web-based retail outlets.<sup>15</sup> TracFone also appears to have an affiliate program that allows customers to earn commissions by signing up other customers.<sup>16</sup> This widespread and diffused distribution network creates new and different risks of fraud, waste, and abuse, risks that are not significantly ameliorated by TracFone's "detailed plan" in its July 13 ex parte. That plan consists of requiring customers to fill out forms, followed by TracFone employees reviewing the verification forms at the corporate office after service has been purchased. It will be difficult, at best, for TracFone personnel to determine compliance based on the forms they receive from all of these different retail providers, as they will inevitably be filled out differently, and with many errors and omissions. Moreover, it is hard to envision TracFone personnel performing the verification any sooner than several days, or even weeks, after the customers purchase supported services, which would allow customers ample time to use improperly acquired service.

When multiple providers are competing to sign up Lifeline customers, the task of ensuring that recipients do not receive multiple subsidies becomes vastly more complicated than it is today. Each company does not know about the other companies' customers, so a customer may find it relatively easy to purchase Lifeline-supported service from several providers at the same time without any of the companies being able to verify that this is not occurring. Allowing resellers to receive support dramatically increases the magnitude of this problem (and all other problems of fraud, waste, and abuse) because, over time, there will surely be far more resellers than there are networks in an area. At the very least, customers should be required to attest that they are receiving support for only one wireline or wireless telephone line.

### ***C. Forbearance Is Not In The Public Interest.***

TracFone is asking the Commission to overturn a Congressional decision that universal service support should be limited to facilities-based carriers. This places a burden on TracFone

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<sup>15</sup> See [http://www.tracfone.com/retailer\\_location.jsp](http://www.tracfone.com/retailer_location.jsp).

<sup>16</sup> See [http://www.tracfone.com/affiliate\\_program.jsp](http://www.tracfone.com/affiliate_program.jsp).

to prove that the Commission can make the affirmative findings that satisfy the statutory test for such a significant ruling. Accordingly, the Commission must consider all of the public interest effects of a grant when making its determination, and it must deny the petition unless the public interest viewed as a whole would be advanced by granting the petition. Moreover, while TracFone points out what it considers to be the positive attributes of its proposal to meet its public interest burden, it would be inappropriate for the Commission to ignore the negative attributes of the proposal when deciding whether TracFone has satisfied its burden of proof.

A major failure of TracFone's petition is the lack of any support for its claim that a grant of forbearance will increase Lifeline penetration. That claim is made throughout its filings and forms the basis of its public interest arguments. However, without a scintilla of documentation of that claim in the record, the Commission cannot consider that claim to be valid and therefore should reject TracFone's public interest claim as unsupported by evidence of record.

In addition, because TracFone provides service over a network of more than 30 licensed wireless operators, it is possible that not all of the underlying providers are E911 compliant. Due to the importance of E911 service, as underscored by the Commission's recent Voice over Internet Protocol Order,<sup>17</sup> the public interest requires that if TracFone is granted forbearance that it must certify that its service is completely E911 compliant.

There are also significant public interest concerns associated with the cost of administering a lifeline support program that includes prepaid, wireless resellers distributing their services through general-purpose retail establishments. Notably, if as seems likely, the costs of administering the Lifeline program increase substantially, then it is also likely that the benefits of granting forbearance will not outweigh the costs.

### **III. APPROPRIATE CONDITIONS MAY MITIGATE THE FAILINGS OF TRACFONES' APPLICATION, ALTHOUGH THEY FAIL TO JUSTIFY FORBEARANCE.**

As stated above, TracFone has not met its burden of proving that its proposed prepaid, wireless resale products, to be distributed through third-party, general-purpose retail establishments, meet the requirements for forbearance under Section 10 of the Communications Act. However, if the Commission concludes that TracFone has met the requirements for forbearance, the Commission must condition its grant of forbearance to limit the public interest harm that could flow from such a grant.

USTelecom has identified eight specific conditions that would address the harms raised in this ex parte letter. These necessary, but not sufficient, conditions are:

*1. The grant of forbearance must be limited to allowing TracFone to seek Eligible Telecommunications Carrier (ETC) status solely for the purpose of receiving Lifeline support.* As mentioned above, TracFone apparently has agreed to this condition. Without such a limitation, TracFone could also receive universal service support from the High Cost Fund, which is designed to help recover the cost of networks, not services. This would not be in the

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<sup>17</sup> See generally, *IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, WC Docket No. 04-36, WC Docket No. 05-196 (rel. June 3, 2005).

public interest as it could lead to double-recovery and the loss of essential support for critical carriers of last resort.

2. *TracFone must certify that it is offering E911 service to all customers and that all handsets are E911 capable.* The Commission has recently required Voice over Internet Providers to offer E911 service and the Commission should expect no less from a Lifeline wireless service. Because TracFone offers service over a network of more than 30 licensed wireless operators it is possible that all of the underlying providers may not be E911 compliant. Due to the importance of E911 service, TracFone should be required to certify that its service is completely E911 compliant.

3. *Lifeline support must be provided on only one phone per household.* The core purpose of Lifeline support is to ensure that low income households can obtain access to the Public Switched Telephone Network (PSTN). This purpose is not furthered when households receive support for more than one line. As discussed above, TracFone's proposed service plans and its requested grant of forbearance from the statutory facilities requirement for receiving universal service support would increase the risk of providing multiple support, while reducing the Universal Service Administration Company (USAC)'s ability to detect and prevent multiple support per household. Accordingly, TracFone must be required to ensure that it receives support only where customers certify that it is claiming eligibility for only one line, either wireline or wireless, per household.

4. *TracFone must fully address and mitigate the issues raised by this new and different method of providing Lifeline service in the separate proceedings wherein TracFone is seeking designation as an ETC.* The numerous and significant public interest concerns that would result from TracFone gaining eligibility for Lifeline support could potentially be mitigated to some extent in those proceedings. For example, improved verification and auditing procedures might be adopted. In the event the Commission grants forbearance, it must carefully evaluate the merits of TracFone's applications and ways in which the public interest could be protected from the increased risks associated with TracFone's services.

5. *A customer cannot use Lifeline-supported service until after TracFone has completed verification of the customer's Lifeline eligibility at TracFone corporate offices, including receipt of documentation that the customer is eligible and verbal confirmation from the customer that his or her household is only receiving support on one line.* As discussed above, it appears likely that TracFone and other resellers will encounter substantially different, and greater, challenges verifying Lifeline eligibility and preventing customers from obtaining multiple support payments. ETCs that provide Lifeline service today are required by the Commission to obtain verification of eligibility, either directly from the customer or through state agencies that verify the customers who are enrolled in qualifying low-income programs. Therefore, the Commission should require no less of TracFone.

6. *Lifeline support will not be disbursed to TracFone until after the Commission rules on TracFone's ETC petitions, and after the Commission (and not TracFone) establishes rules that determine the appropriate and competitively neutral amount of support for the product on which Lifeline support is sought.* As discussed above, it is not clear that it would be just and reasonable, or competitively neutral for TracFone to receive the same dollar amount of support for its proposed service offerings as do wireline, facilities-based carriers offering Lifeline



service. Therefore, the Commission must do its own analysis and adopt appropriate Lifeline supports amounts for TracFone offerings should TracFone obtain forbearance.

7. *Failure to abide by these conditions must result in revocation of ETC status.* The Commission should make compliance with its conditions essential for granting TracFone's ETC petitions. This will increase TracFone's incentives for adhering to the conditions, and it will directly address any harm that would flow from violation of the conditions.

8. *The Commission should also make clear that it will not consider additional similar forbearance petitions from other resellers until it has completed a rulemaking to consider whether to modify its Lifeline rules.* It can be expected that a grant of forbearance to TracFone will induce other resellers to file similar requests. To avoid being flooded with such requests, the Commission should quickly review the larger public interest issues raised by these requests in a general rulemaking.

There may well be, and indeed likely are, other conditions that would be necessary to address other potential harms. Therefore, the foregoing list is not exhaustive, and the Commission should consider appropriate additional conditions to deal with such issues.

Sincerely,



Jeffrey S Lanning  
Associate General Counsel

cc: Michelle Carey  
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